No. 8843

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY TO APPELLEE'S STATEMENT OF FACTS.

Appellee concedes the correctness of our statement of facts "in the main," but points out no error therein, and then launches into irrelevant and emotional discussion of events occurring *after* the alleged utterances of which complaint is made (Appellee's Br. pp. 1-7). These utterances complained of are remarks supposedly made by Harbinson and Gould on October 15, 16 and 17, 1934. But appellee's discussion (Br. pp. 3-7) has to do with occurrences between Gray, on the one hand, and Mr. White, Swift's General Manager, Mr. Hartl, its Auditor, and Mr. Kelly, its Sales Manager, subsequent to Gray's return from his vacation, on October 29 and 30. Appellee says that on these days—October 29 and 30—Messrs. Hartl, White and Kelly called him in and made accusing statements to him.

Not only is appellee's discussion immaterial, but it is contrary to the facts. It is based on scattered fragments of testimony of Gray but ignores Gray's own admissions on cross-examination. On cross-examination he admitted that

> "*Mr. Hartl never said to me that I had stolen any money;* what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and *that I was short,* and my accounts came to some $150, and it was up to me to make it up. *He did not say I had stolen any money; he said my accounts did not balance, that I was short.*" (R. 125, 126)

This Court has recently said, in *National Labor Relations Board v. Union Pacific Stages,* — F.(2d)—, (No. 8489, Sep. 23, 1938) that direct examination must be read in the light of cross-examination and that to arrive at a finding without doing so is to go beyond the record. Indeed, Gray's direct examination, as quoted in his brief, shows that there was no accusation of crime but merely statements that moneys and records were missing, that he was careless, and that he so understood what was said.

Moreover, these fragments of Gray's testimony on direct examination were contradicted by the other witnesses. Without minute discussion, we refer to the record, pages 163-5, 168-171. It cannot be said that the conflict has been resolved in favor of the plaintiff by the jury verdict. A verdict has the effect of resolving conflicts only where the particular question of fact is in issue and where the issue is presented to the jury. The remarks of Swift's officers were not in issue. It is not claimed that those remarks are actionable. No issue concerning them was given to the jury to decide. The trial court instructed the jury, and properly so (*Biggs v. Atlantic Coast Line Railroad Co.,* 66 F.(2d) 87, C. C. A. 5th; *Prins v. Holland-North America Mortgage Co.,* 181 Pac. 680, 107 Wash. 206), that the utterances made by the officers of the corporation to each other or to plaintiff were not actionable because they could

not be considered as having been published by the corporation (R. 180).

The substance of the conversations between Gray and Swift's officers was merely that the money had not been received by Swift. There was no claim that he had taken it, it being only pointed out that salesmen were not relieved of responsibility until they had their receipt, and that Gray had been careless, as he admitted (see our Opening Brief, pp. 19-20).

Of other irrelevant discussion in appellee's brief we shall say even less. With respect to the claim that he was refused permission to examine Swift's records, the fact is, as Gray himself testified, that he was permitted without question to examine the records (R. 82, 167); that he later came back and asked permission to examine the records again, and that he was allowed again to examine them after only momentary delay (Gray's testimony, R. 113).

Much is said by appellee of being "blacklisted" with bonding companies and of being "coerced" into giving his check for the shortage. Employees are not bonded merely against dishonesty but also against any failure to account for moneys collected. The purpose of a bond is to protect the principal against the loss, whatever its cause. Swift was entitled to collect upon its bond if the shortage was permitted to continue; informing Gray that it would be necessary to refer to the bonding company was not coercion. The propriety of his paying the shortage though he were guilty of no crime was recognized by him. He himself testified, as did his witness Harbinson, that before going on his vacation he admitted that since the money was gone and he had no receipt to show for it, it was incumbent upon him to make it good, and that he offered to pay for the shortage when ascertained (See our Opening Brief, pp. 7-9).

Appellee's brief (p. 5) then goes into something even more irrelevant,—the matter of Jack Hamilton, which arose in the spring of 1935. The insinuation is that it was Hamilton who

embezzled the moneys in question. There is no evidence to support this claim. The difficulties in which Hamilton found himself in the spring of 1935 had to do with things not here involved (R. 165, 166). Plaintiff's testimony about the Hamilton matter was objected to by appellant and exceptions were preserved (R. 119-20); the matter was too unimportant, however, for us to discuss in our opening brief.

The claim that the plaintiff was "fired" (Appellee's Br. p. 5) was shown on his cross-examination to be untrue. He was taken off the sales force and offered a position in the plant (R. 123, 169), as his brief guardedly admits by saying that he was refused a sales job.

But enough of this. This is an action for slander based upon alleged utterances of Harbinson and Gould, to which all these matters are irrelevant.

We therefore turn to the question of whether there was any actionable slander for which Swift may be held responsible.

DISCUSSION.

I. The Utterances Complained of Were Made on a Privileged Occasion.

A. Appellee Concedes That the Words Were Uttered Without Malice, and That Whether the Occasion Was Privileged Is Purely a Question of Law.

Appellee's brief makes certain concessions which simplify the issues. It concedes

(1) that the question of the existence of privilege is for the court (Appellee's Brief, pp. 11-12); and

(2) that no actual malice was present in the case, i. e., that the words complained of were uttered without malice (Br. pp. 12-13).

It is therefore conceded that if the occasion was privileged, there was no actionable slander even if the words were false and defamatory, and that in determining whether the occasion was privileged, the verdict of the jury is without any bearing or influence. This Court is both permitted and required to decide that question upon its own unrestricted judgment.

B. The Occasion Was Privileged.

Appellee's reply to our claim of privilege is based upon a contention that the check of the route was being made only for the advantage of Swift and in no degree for the advantage of the customers. Our answer is two-fold: (1) Even if true, it would be immaterial; and (2) it is not true.

There is no requirement that, for the occasion to be privileged, the one to whom a communication is made should derive an advantage from it. What the law seeks to ascertain is whether the remark was thrown forth gratuitously at a time and place to which, in the ordinary conduct of affairs, it had no reasonable relation, or whether it was said on such an occasion as to make it appropriate for the one party to address the other on the general subject matter,—in short, whether the utterance was mere idle gossip-mongering or an incident of the transaction of business.

There is no requirement that the communication be made to protect the interests of the party spoken to, as appellee's brief (p. 10) assumes when it says, "These statements were not made to protect the interests of the customers * * *." It is enough if made "with a fair and reasonable purpose of protecting the interests of the person making them" (*Massee v. Williams,* 207 Fed. 222, 230, C. C. A. 6th), or "in order to protect his [the utterer's] own interests" (36 *Corpus Juris* 1262). There is nothing in *Civil Code, Section* 47, subdivision 3, to the effect that privilege requires the protection of the interests of the party to whom an utterance is made. The requirement is merely that he be "interested." To say that

he is "interested" is merely to say that he has a reasonable relationship to the general subject matter. His interest need only be such an interest as exists when the subject matter of the publication makes it "reasonably necessary under the circumstances to accomplish the purpose desired" (36 *Corpus Juris,* 1262). Here the customers had a close relationship to the subject of the checkup, since they were the only persons from whom the facts could be ascertained.

When the authorities speak of a communication being made in the performance of a "duty, whether legal, moral, or social, even though of imperfect obligation," the words "legal," "moral" or "social" are not used for purpose of limitation but, on the contrary, to show how extensive the concept of privilege is. As said in 26 *Cal. Law Rev.,* 226 at 228:

> "The breadth of this definition forbids any attempt to confine the privilege referred to within narrow limits."

Appellee's whole contention is that since the customers who had bought goods from Gray had receipts from him, they could not be forced to pay again and therefore were not concerned. Aside from the rule that receipts are not conclusive, it suffices to refer to *McLaughlin v. Standard Accident Ins. Company,* 15 Cal. App. (2d) 55, 59 Pac. (2d) 631, discussed in our opening brief at pages 29 and 30. There the customers had paid their insurance premiums, had their receipts, and could not be required to pay again. Paraphrasing the language applied by appellee's brief (p. 7) to our case,

> "there was not * * * even an intimation that any charge * * * was to be made against the customers, themselves, that they had not paid the premiums, or that any obligation of theirs to the insurance company was being, or could be, called into question."

Nevertheless, the occasion was held to be privileged.

Again, in *Flowers v. Smith,* 80 S. W. (2d) 392 (discussed in our opening brief, pp. 31-32) there was no advantage to

be derived from the communication by the party communicated with. The universal test is often stated in the following language quoted in the *Flowers* case and having its origin in *Toogood v. Spyring* (1834), 1 C. M. & R. 181 (Eng.):

> "If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society."

That the communications in the present case were honestly made follows from the concession that they were made without malice. When appellee (Br. p. 9) says, "There was no bona fide statement made" because "the statement was false," he is in confusion. Falsity is immaterial if privilege exists; falsity does not prove or tend to prove lack of bona fides; lack of bona fides and malice are equivalents; lack of malice has been conceded.

Moreover, as noted at the beginning, appellee's assumption that the customers could obtain no advantage from a checkup and straightening out of the accounts is false. Having dealt with Swift, it was a matter of advantage to the customers that Swift's records reflect the true facts. It is not enough that the possession of signed receipts will ultimately protect a customer from liability for double payment of accounts. It is a matter of interest and advantage that the accounts be properly stated and mutually recognized. Moreover, when appellee says that the customers had receipts, he forgets that many of the sales made by Gray were not cash but credit sales. Two-thirds of his customers were credit customers (R. 121). The checkup that was made sought not only to find the cash tags but also the credit tags (R. 154). It was of interest to these customers that Swift know of their indebtedness to it. To claim otherwise is to ascribe dishonest purposes to them.

Appellee also claims (Br. pp. 9-10):

> "All that these men [Gould and Harbinson] need have said in response to the customer's queries as to why they

> wanted to see the customer's tags was that the records of the Company were missing."*

If this is the fact, it demonstrates that Gould and Harbinson were acting beyond their authority and therefore exonerates the defendant on the second ground discussed in our opening brief (Open. Br., pp. 52-71). At the same time it does not by any means affect the privilege. The law does not analyze a situation to determine objectively whether what was said went beyond the bare necessities, and it does not hold against the privileges if it concludes that less might have been said. The test is whether there was malice,—the state of mind of the utterer. As was pointed out in our opening brief (p. 39) quoting from *Davis v. Hearst,* 160 Cal. 143, 167, which in turn quotes *Odgers on Libel and Slander*:

> "Mere inadvertence or forgetfulness, or careless blundering is no evidence of malice. Nor is negligence or want of sound judgment."

In the leading case of *Gattis v. Kilgo,* 128 N. C. 402, 38 S. E. 931, 935, the court said, in the course of a thorough analysis, quoting *Odgers*:

> "The tendency of the courts is not to give the language of privileged communications too strict a scrutiny. 'To hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would, in effect, greatly limit, if not altogether defeat, that protection which the law throws over privileged communications'."

Bared to its essentials, the case is this:

There was a nexus between Swift and its customers, a natural relationship, which attached a privilege to the occasion. There was a propriety in Swift's desire to check the route, and a naturalness and reasonableness in communicating to the customers, who were not strangers to the situation. If such an

*This is all that Gould testified he did say (Our Op. Br., p. 17).

occasion is not privileged, then every business concern in a like situation is to be paralyzed by fear of unforeseeable consequences from ascertaining facts on the knowledge of which alone the conduct of the business may rationally proceed.

II. Appellant's Employees Were Not Acting in the Course or Scope of Their Employment in Making the Alleged Utterances.

A. Swift Is Not Responsible for Any Remarks of Harbison.

We deny that Harbinson was sent out by Mr. Everett, assistant sales manager, to check the route. We assert further that even if he was sent out by Mr. Everett, the latter had no authority in the premises and therefore Harbinson had none.

The appellee concedes that the sales department had no authority and nothing at all to do with the matter of discrepancies, shortages, checking or accounting (Br., p. 14). But then, in order to bring within the scope of Everett's authority his assumed directions to Harbinson to check the route, appellee argues that the "sales department" had the duty of furnishing the auditing department with proper reports of sales (Br., p. 14) and that in having the route checked, Everett was seeking to obtain proper reports to supply to the auditing department.

To admit in one breath that the sales department had nothing to do with discrepancies or with checking and to claim in the next that the sales department as such had the duty of furnishing records to the auditing department, is to deny what is just affirmed.

There is no evidence to support the suggestion that the sales department had any duty to furnish to the auditing department sales reports. The undisputed evidence is that it did not have any such duty.

Swift's salesmen not only had sales functions but also functions of collecting and accounting. But the duty owed by the truck driver to the sales department was merely to sell, whereas the duty to collect and report was owed to the auditing department.

The duty of keeping and turning over records of collections and credit sales was not the duty of the sales department *but the personal duty of the truck driver.* If he failed in that duty, which he owed to the auditing department, *it was the function of the auditing department to gather the information and complete its records. The sales department had no duty or power in the premises at all.*

Truck drivers did not hand over their records to any superior in the sales department to be in turn handed over by the sales superior to the auditor. The records went directly from the salesmen to the auditing department (See our Op. Br. pp. 4-5), and no sales superior made reports to the auditing department. If the sales department had any duty of completing sales records and supplying them to the auditing department where a truck driver had been remiss or careless in his duty, the act of the auditing department in making its own check, as it here did by sending out Charles Gould, would be futile duplication.

There can be no inference that it is the duty of a sales department, i. e., the sales manager or assistant sales manager, to supply records to the auditing department. Some companies may follow such a practice; others do not. Swift did not. Indeed, the more normal situation is that the sales manager and sales department are interested only in promoting sales. Collections and records fall within the auditing department. If a truck driver has combined functions, he is a representative of both departments, *pro tanto.* This was Swift's system. The whole situation was summed up in the uncontradicted testimony of Mr. Everett as follows:

> "The other reason was that there are definite instructions in Swift and Company to their sales department, that when

> discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, *that man automatically comes under the jurisdiction of the plant auditor and* the only part we play is replacing the man on the route. The plant auditor tells us that he is going to take the man off the route and we have nothing to do except to replace him with a suitable man." (R. 146)
>
> * * * * * * *
>
> "In case a discrepancy occurs *of this character,* the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department." (R. 147)

The appellee did not ask any witness a single question concerning any supposed function or duty of the sales department to complete and turn over sales records to the auditing department. Appellant did question the assistant sales manager, Mr. Everett, the auditor, Mr. Hartl, and the general manager, Mr. White, concerning the authority of the sales department and the auditing department; it was obvious that their testimony was directed to the entire subject. If the appellee at that time felt that there was some distinction between a duty to check discrepancies and a duty to check in order to complete sales reports, it was for him to explore the subject by cross-examination. The burden of proving authority in Harbinson was on the appellee. But he made no effort whatever to go into the subject or to support his burden; his counsel asked no questions of any witness concerning the matter. It is too late on appeal to supply missing proof by unfounded inferences.

A review of what was done is illuminating. Swift did employ a device for the purpose of keeping a record of all sales. That device, the "checkerboard" system, was entirely within the auditing department (R. 162). Even if we accept the plaintiff's version that Harbinson was sent out by Everett, Harbinson was *not* sent out to complete records to be turned over to the

auditing department. The plaintiff's story is that, since he desired to go on his vacation, he told Mr. Everett that he was prepared to have Harbinson sent out to ascertain what the shortages were so that the moneys due Gray could be applied against the shortage. In other words, the purpose of a check through Harbinson, according to plaintiff's own version, was to permit an adjustment of the discrepancies between the salesman and the company (See our Opening Brief, pp. 7 to 10). It is not claimed that Harbinson was asked by Mr. Everett to find and make copies of missing sales tickets and to turn them in, and Harbinson did not make copies of any such tickets or turn any records in. Consequently, even if there were some duty on the sales department to complete and turn over records to the auditing department, Harbinson was not engaged in carrying out such duty. The task of checking missing sales tickets, making copies and bringing copies back was not undertaken until Hartl, the auditor, sent out Gould to do the work.

We submit that Harbinson was not acting within the scope of his employment.

B. Swift Is Not Responsible for Any Supposed Utterances of Gould.

We now turn to Gould, bearing in mind that if Gould lacked authority to make the alleged remarks, Harbinson was without such authority for the same reason, in addition to the reasons peculiar to himself.

As to Gould our point is that while he had authority to check the route, he went beyond the scope of his authority if and when he made the alleged utterances.

Appellee does not meet the issue. The issue is the scope of Gould's authority, but appellee discusses an entirely different matter. The gist of appellee's argument is that a corporation may be liable for slanderous remarks of an employee in the

same circumstances wherein it would be responsible for libelous statements by him, and that it is not necessary to prove that the superior expressly directed the slanderous statements or ratified them. In other words, appellee contends for the majority rule. Now, in our opening brief, after pointing out the majority and the minority rules (Open. Br. p. 54), we proceeded to discuss the subject upon the express assumption that the majority rule will be applied (Br. p. 55). We showed that even under the majority rule Swift could not be held for the alleged remarks of Gould because Gould's utterances were not within the course or scope of his authority. To this, the heart of the issue, appellee's brief gives no reply or even consideration.

The very authorities cited by appellee show that under the majority rule it is not enough that the one making the utterances be an employee. The additional elements are variously stated, but a composite, compiled from appellee's own authorities, is helpful. The employee must have been acting (a) within the scope of his employment, (b) in the actual performance of his duties, and (c) in the course of transacting the business of the corporation (cf 5 *Thompson on Corporations* (2d ed.) p. 5441). The remarks must have been uttered (d) in the course of such business, (e) in the line of his employment, (f) *in connection therewith,* (g) *in connection with the very thing he was looking after for his corporation,* (h) in the actual performance of his duties, and (i) and *touching the matter in question,* i. e., the subject matter of his duties, the particular matter in hand (*Fensky v. Maryland Casualty Co.,* 174 S. W. 416, 264 Mo. 154, *Hypes v. Southern Ry. Co.,* 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873). (j) The matter must be one within the duty of the slandering employee to adjust (*Courtney v. American Railway Express Co.,* 120 S. C. 511, 113 S. E. 332, 24 A. L. R. 128).

The cases cited by appellee in no way support the view that Gould was acting within his authority when he made the alleged

remarks. In only one was there a trial of the facts, *Courtney v. American Railway Express Co., supra, and there a verdict in favor of the plaintiff was reversed upon the ground that a directed verdict should have been entered for the defendant.*

The three cases cited by appellee are further analyzed and discussed in an appendix to this brief, pages i to iii.

In addition to the cases cited in our opening brief, we cite *National Packing Co. v. Boullion,* 151 S. W. 244, 105 Ark. 326. There it was held that a corporation was not liable for a slanderous accusation of forgery and larceny made by an auditor investigating accounts of a shipping clerk showing a shortage; while it was the duty of the auditor to investigate shortages, gather evidence showing who was responsible, select his own methods and use his own judgment in making the investigations, he did not have authority to accuse anyone of a crime in connection with the defalcation and he was not authorized to make charges of a criminal nature against anyone.

We submit that under the facts of this case neither Harbinson nor Gould was acting within the course or scope of his employment in making the alleged remarks.

III. The Words Uttered and Supposed to Have Been Uttered by Harbinson and Gould Are Both True and as a Matter of Law Nondefamatory.

On this subject appellee (Br. p. 20) cites *Ecuyer v. New York Life Ins. Co.,* 172 Pac. 359, 101 Wash. 247. We are grateful, because its holding is the exact opposite of what appellee attributes to it. The words, which appellee states the *Ecuyer* case held to be slanderous, were expressly held to be not slanderous and to be true under facts essentially identical with those of the present case. There the plaintiff, Harry Ecuyer, was employed as a clerk of the defendant with the duty of receiving premium payments. Certain receipts for

premiums had been given by him, but he had turned in neither money nor record. Utterances to four people were proved, to the plaintiff's father, to one from whom plaintiff, after discharge by defendant, sought employment, and to the cashiers of two other branches of the defendant. To the father the following statement had been made:

> " 'Harry is short in his money. * * * He has been using the company's money. * * * Harry is short in his accounts. * * He has been taking the company's money. * * * Harry has stolen the money. * * * Harry has stolen the company's money. * * * What has Harry used this money for that he has taken?' " (172 Pac. 360, 361)

The court held that this statement was slanderous because it expressly and repeatedly charged the plaintiff with having stolen. But it added that if the statement had been confined to an expression that the son was short, it would not have been defamatory and it would have been true. It said (362):

> "They were direct, unequivocal, and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cashbook showed that he had not accounted for it. *Had the offending communication been confined to a statement of those facts, the evidence, which conclusively established their truth, would have made a complete defense.* But it was not so confined. He was charged with stealing the money." * * *
>
> "Had the charge been confined to the admitted facts, *with the legitimate deduction that he was short in his accounts,* we would be able to say as a matter of law that the communication was not in excess of the privilege." (363)

To the utterance to the father may be contrasted the statement to the prospective employer; the following words were uttered (361):

> "* * * that plaintiff had been at least careless in his work; that when he checked plaintiff there was an item of some $34, more or less, short, * * * that plaintiff * * * had left his keys in the cash drawer containing $200 or $300 in cash; that, if a man wanted to steal, that would be one way to do it. *He stated that plaintiff was short in his money; also, short in his accounts.* As a result of the talk, Ward did not employ plaintiff, advising him that he would not do so without a 'clean bill of health' from the New York Life Insurance Company."

The court held that these words were not slanderous and that they were true. It said (363):

> "*They stated the facts truthfully,* and said that appellant had been at least careless. *There is no evidence that they directly charged appellant with theft, or that the words used were designedly capable of that construction, however Ward may have construed them.*"

To the cashiers in the other branches the following or similar words were uttered (361):

> "*he was short in his accounts,* and in substance that he had received cash from premiums *and did not turn the money into the company,* nor report it."

These are the words appellee erroneously says the case held to be slanderous. In fact the court said that they fell in the same category as the words to the prospective employer.

> "The statement went no further than *that appellant was short in his accounts,* and that none of the clerks was charged with the theft." "It was confined to the exact truth." (363)

The *Ecuyer* case is thus complete support for our contention that each of the two statements,—that Gray was short and that he had not turned in moneys collected—was true and nondefamatory. We find nothing in appellee's brief contending that the first statement,—that Gray was short—was not true, and

if this one remark is true, a reversal necessarily must follow. (See discussion, our Opening Brief, pp. 74, 75.) Appellee does argue that the second statement,—that Gray had not turned in the money—is not true (Appellee's Brief, pp. 22-23), simply because of Gray's testimony that he had thrown the money into the cage. But the physical fact of tossing the money into the cage was not equivalent to turning the money into the company. The uncontradicted evidence is that no man was relieved of responsibility or considered discharged of his obligation with respect to collected moneys until he had obtained a receipt from some authorized representative of the company. To say of one that he had not turned in money is not equivalent to saying that he has kept it. The *Ecuyer* case, supra, shows that it is truthfully said of one who has not accounted for money to the proper officials that he has not turned it in, even though others may have purloined it and irrespective of the conclusion which may be drawn by the parties to whom the utterance is made. The fact that for a period of time Gray had fallen into the habit of ignoring the rule of the company requiring the delivery of money into the hands of the cashier, night order clerk or night watchman each night does not mean that he had "turned in" the money by tossing it into the cage.* In any event, a statement that he had failed

*As an excuse for violation of the rule, appellee now says that he did so "in order not to leave them [the collections] unattended for any greater length of time than necessary." (Appellee's Brief, p. 2.) In October 1934 the excuse which Gray gave was that when he came in from work he was too tired to complete his records. The explanation which he gave at the trial was that there was no one at the office at night who would give him a receipt. We so showed in our opening brief (p. 6) where we pointed out the weakness of the excuse in view of the fact that he still did not obtain a receipt when he tossed the moneys into the cage the next morning. The present explanation that he retained the collections over night for their greater safety is newly created, and it is equally weak. If he had turned in the collections at night, as required by rule, to the cashier, night order clerk or watchman, the moneys would have been placed in a strongbox (R. 158-160) instead of being kept under his bed or behind his bureau (R. 148).

to turn in money physically would not have been a charge of embezzlement and so would not have been defamatory.

As noted (Opening Brief, pp. 73, 74), there are three statements charged in the complaint. Appellee persists in treating the three statements as having been uttered as a single whole. This, of course, is in error (see our Opening Brief, p. 74), and the construction to be given the words, if a single utterance, does not concern us. The third alleged statement, that Gray had taken the company's money, was spoken to no one. This is conceded by the appellee when he argues that "in proving such a slander it is not necessary to prove the use of the exact words charged, provided the proof does contain the sting of the charge" (Br. p. 21), and reference is made to a supposed statement to one person that Gray "was accused" of taking money and to a supposed statement to another that "it seemed" he had taken money.* Assuming that if these words had been spoken, they may be taken as a substitute for the words charged, nevertheless they were denied, and there can be no inference that the jury decided they were spoken for reasons discussed in our opening brief (pp. 74, 75 and Appendix, p. 9). Nor, if spoken, were these words defamatory for reasons discussed in our Opening Brief (pp. 77-78 and Appendix pp. 12-15). No effort is made by appellee either to answer our discussion or to refer to it. Moreover, the rule concerning the "sting of the charge" will not permit the substitution of these words for those charged in the complaint. The rule concerning the "sting" is merely that if only a part of a charged utterance is defamatory, proof of the defamatory portion alone is sufficient. But

> "It is unavailing that the evidence shows the utterance of language from which the jury may find defendant in-

*Appellee's brief (p. 21), in quoting the latter remark, improperly omits the words "it seemed," thus changing the statement to a positive one. It also assigns this remark to Harbinson, whereas appellee's witness had in fact assigned this remark to Gould who denied it. (See our opening brief, p. 18.)

> tended to charge plaintiff with the slanderous accusation; the function of the jury is to determine whether defendant spoke the words alleged in the complaint. [Here a passage re 'sting'.] Equivalent words, or words of similar import, are insufficient, as are words that might produce a similar impression to that of those alleged." (16 *Cal. Jur.* Sec. 67, p. 98)

And see *Bell v. Kelly,* 82 Cal. App. 605, *Geo. Haub v. Freiermuth,* 1 Cal. App. 556, and *Fleet v. Tichenor,* 156 Cal. 343, where an allegation that the defendant had said of the plaintiff that she had entered the defendant's house and stolen jewelry was held not proved by showing an utterance that plaintiff had taken the jewelry.

Other things are said in appellee's brief (pp. 23-24) which are entirely immaterial as, for example, the reference to the attitude of Swift's officers. The utterances which appellee relies upon as constituting slander were those supposedly made by Harbinson and Gould, not statements of Swift's officers (see p. 1, supra). What was said by Swift's officers between themselves and to Gray in the bosom of the corporation, subsequent, as it was, to the remarks of Harbinson or Gould, neither explains nor could be reflected in anything that Harbinson or Gould theretofore had said. Indeed, Kelly was on a vacation at the time, Harbinson had never talked to White, Hartl or Kelly, and Gould had talked only to Hartl, and in that conversation, fully covered by the record, nothing was said condemnatory of Gray (R. 149, 150, 163).

It is not true that White, Hartl, or Kelly ever thought that Gray had stolen money. But even if they had, that is not the issue. The issue is whether Harbinson and Gould had said to customers that Gray was guilty of embezzlement. We submit that what they said does not have that meaning.

IV. Evidence Was Erroneously Admitted Concerning Efforts of Plaintiff to Find Employment.

This subject was discussed in our opening brief in an appendix (pp. 15-24) due to lack of space under Rule 24(e). For the same reason, we now place our reply in the appendix to this brief (pp. iv-v). Our failure to discuss the subject in the body of the briefs in no way lessens our reliance on it as ground for reversal. The matter goes, however, to the question of damages and not to that of liability, and we prefer in the space alloted to us in the body of the briefs to discuss liability.

CONCLUSION.

This is an action for slander, not an action for wounded feelings, injury to pride, or loss of employment. It is, moreover, an action against Swift and not one against Harbinson or Gould.

We submit that the judgment should be reversed with directions to enter judgment for the defendant.

Dated: San Francisco, California, October 8, 1938.

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(APPENDIX FOLLOWS)

Appendix

I.

ANALYSIS AND DISCUSSION OF CASES REFERRED TO IN PART II, B, OF THE FOREGOING BRIEF, CONCERNING GOULD'S LACK OF AUTHORITY.

At page 14 of the foregoing brief we stated that we further analyze and discuss in the Appendix authorities cited by appellee. The discussion follows:

In *Courtney v. American Railway Express Co.,* 120 S. C. 511, 113 S. E. 332, 24 A. L. R. 128, the appellate court, as noted, held that a directed verdict should be entered for the defendant. While agreeing that a corporation may be liable for remarks of an employee in a proper case, the court adhered to the strict tests of the scope of an employee's employment. It approved two of the cases relied on by us in our opening brief, *Washington Gas Light Co. v. Lansden,* 172 U. S. 534, 43 L. ed. 543, 19 S. Ct. Rep. 296, and *Vowles v. Yakish,* 179 N. W. 117, 191 Ia. 368.

Both of the other cases cited by appellee, *Fensky v. Maryland Casualty Co.,* 174 S. W. 416, and *Hypes v. Southern Ry. Co.,* 82 S. C. 315, 64 S. E. 395, were decided on demurrer to the complaint. The basis of each demurrer was the contention that a corporation cannot be liable for slanderous statements of an agent and that there can be no agency to slander. In ruling against the demurrer the appellate court in each case merely enunciated the majority rule that a corporation may be liable for slander in a proper situation. In each case the allegations of the complaint were most extensive with respect to the agency. No question of proof was involved.

Thus, in the *Fensky* case the complaint alleged that the employee made the remarks as "agent of defendant, while

acting within the scope of his employment and in the actual performance of the duties touching the matter in question" and again, as "agent of said defendant, while acting within the scope of his employment and in the actual performance of duties assigned to him by this defendant." The facts alleged were that the plaintiff was an attorney, that he had been engaged in writing by one May to file an action for personal injuries against a party assured by the defendant, and that defendant's agent called upon plaintiff with May, who asserted that May had not signed the authorization to the plaintiff to act.

> "The facts [as alleged] show that this agent was looking after this claim against the defendant, and it of necessity required the agent to investigate the contract of plaintiff, which gave plaintiff an interest in the claim. Whatever was done and said was done and said in the very performance of the agent's duty to his master. In effect, when this agent approached plaintiff, the plaintiff not only asserted that there was a valid claim against the agent's principal, but further that, by reason of the contract, he (plaintiff) had a half interest in that claim. To this the agent in effect said: Yes, you claim under that contract, but that contract is a forgery, and you know it, and we have the man right here with us to prove that it is a forgery."

And since the matter was before it on demurrer, the court said that it was necessary to apply a liberal construction to the complaint in order to sustain it.

The facts of the *Hypes* case are those of which appellee's brief (p. 18) erroneously assigns to the *Courtney* case, except that the appellee leaves out the essential facts. There plaintiff was a locomotive engineer of the defendant and at the end of the month turned in his time report showing the number of hours he had worked during the month. His claim being disallowed by the defendant to the extent of $37, the plaintiff, after some correspondence, had an interview with the

superintendent of the railroad at division headquarters at which time they "took up the matter of plaintiff's unpaid time." The complaint alleged that the superintendent called plaintiff a "thief." It further alleged:

> " 'That the action of the said P. L. McManus in accusing plaintiff of "stealing" and of being a "thief" *was done within the scope of his authority, and in the discharge of his duties as superintendent as such; that he was acting for the Southern Railway Company and for its interests,* as indicated by his words, "I am going to stop you fellows from stealing from the company"; that the tort against the plaintiff was committed in the office of the said superintendent, while going over the books, considering the question of plaintiff's time, *which said P. L. McManus had full authority and power to settle'.*"

There was no issue of fact involved but only a matter of construing the complaint. The *Hypes* case, in fact, approves *Sawyer v. Norfolk & S. B. Co.,* 142 N. C. 1, 54 S. E. 793, and *International Text-Book Co. v. Heartt*, 136 Fed. 132, two cases which we cited in our opening brief as showing the limitations upon liability of a corporation for slander. As to the case before it, the court placed emphasis on the fact that the slander grew out of a "dispute as to the correctness of plaintiff's claim for wages, a matter within the duty of the agent to adjust." This factor is emphasized also in the *Courtney* case, in explaining the *Hypes* decision. By way of contrast, the *Courtney* decision notes that under its own facts the employee had merely uttered a personal opinion concerning a matter of accounts which he had no duty to settle. *Such is the case here.* Gould, while he had the authority to ascertain what customers had paid Gray, had no duty to ascertain the reasons for the shortages, to make adjustments, or express opinions.

II.

EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF PLAINTIFF TO FIND EMPLOYMENT.

This is the fourth ground upon which appellant submits that the judgment should be reversed. It is noted on page 20 of the brief.

In our opening brief, we contended that it was prejudicial error to admit evidence of plaintiff's efforts to find employment, because (a) there is no evidence that any of the utterances were ever heard by those from whom employment was sought, and (b) a defendant cannot be held liable for unauthorized repetitions of a slander by those to whom uttered.

Our authorities are ignored by appellee, who cites none on his own behalf. Appellee's whole reply is an assertion that it ought to be supposed that he was unable to get employment by reason of the alleged utterances. Thus appellee claims (Br. p. 26) that "these things happened just after the slander had been committed. The slander had been widespread in a sales territory where all these concerns were daily transacting a similar business." But there is no evidence that these statements were widespread. There is evidence of remarks made to only eleven people (Opening Brief, p. 74), and no assumption that they were made to others is justified.

The logical inference from the proof is that Gray's inability to obtain employment was due to economic conditions. While he spent only two months in and about San Francisco seeking employment during which time he had one job, he then went to Los Angeles and there was unable to obtain employment for six months (R. 121); yet there is no claim that the alleged utterances had been spread in Los Angeles or contributed to his inability to obtain employment there.

Appellee further says that he ought not to be required to prove that his inability to obtain a job was due to the utterances, for the reason that the proof would have to come

from the lips of those who refused to employ him. But difficulty of proof does not dispense with proof. Moreover, Gray made no effort to call any of these men as witnesses. It may not be inferred that, if called, they would all have committed perjury. It may not be assumed without evidence (1) that these men heard the utterances, and (2) were motivated thereby. Appellee, it will be seen, is seeking to pyramid a supposition upon a supposition, for even if an inference were permissible that if these businessmen had heard the alleged utterances they would have for that reason refused employment to the plaintiff, there was still no evidence even offered that they had heard the utterances. Such evidence, if it existed, would not have to come solely from the lips of the prospective employers. Indeed, it is not claimed that Harbinson or Gould made any remarks to any of those to whom plaintiff applied for a position. The foundation of the second supposition is that these businessmen heard some repetition of the remarks through third parties not in the employ of Swift. But even if such an inference were possible, the rule of law is that a defendant may not be held liable for the effects of a repetition (See our opening brief, Appendix, p. 22).

We suggest that the appellee's comments on the speed with which lies are wont to travel, his comments on his youth, his endeavors to educate himself for a position with Swift, the setback to his career by reason of losing his job, etc., are just the material for an appeal to a jury's prejudice which the law seeks to eliminate in slander cases by the rules which we invoke.